

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services
Labor Standards Bureau

Office of Hearings and Adjudication
COMPENSATION REVIEW BOARD



(202) 671-1394-Voice
(202) 673-6402 - Fax

CRB No. 06-82

CAROL MIDDLEDORF-KELLY,

Claimant – Petitioner,

v.

WASHINGTON HOSPITAL-CENTER AND BROADSPIRE/THIRD PARTY ADMINISTRATOR,

Employer/Carrier – Respondent.

Appeal from an Order of
Claims Examiner Toni Green
OWC No. C2005-611238

Richard W. Galiher, Esquire, for the Petitioner

John C. Duncan, Esquire, for the Respondent

Before LINDA F. JORY, JEFFREY P. RUSSELL AND FLOYD LEWIS, *Administrative Appeals Judges*.

LINDA F. JORY, *Administrative Appeals Judge*, on behalf of the Review Panel

DECISION AND REMAND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board pursuant to D.C. Official Code § 32-1521.01 and 32-1522 (2004), 7 DCMR § 230 (1994), and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).¹

¹ Pursuant to Administrative Policy Issuance No. 05-01, dated February 5, 2005, the Director of the Department of Employment Services realigned the Office of Hearings and Adjudication to include, *inter alia*, establishment of the Compensation Review Board (CRB) in implementation of the District of Columbia Fiscal Year 2005 Budget Support Act of 20024, Title J, the Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, sec. 1102 (Oct. 1, 1994) codified at D. C. Code Ann. §§ 32-1521.01, 32-1522 (2005). In accordance with the Director's Policy Issuance, the CRB replaces the Office of the Director in providing administrative appellate review and disposition of workers' and disability compensation claims arising under the D.C. Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005) and the D.C. Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code §§ 1-623.1 to 1.643.7 (2005),

Pursuant to § 230.04, the authority of the Compensation Review Board extends over appeals from compensation orders including final decisions or orders granting or denying benefits by the Administrative Hearings Division (AHD) or the Office of Workers' Compensation (OWC) under the public and private sector Acts.

BACKGROUND

This appeal follows the issuance of a Final Compensation Order from the Office of Workers' Compensation (OWC) in the District of Columbia Department of Employment Services (DOES). In that Order, which was filed on August 10, 2006, the Claims Examiner determined that OWC did not have jurisdiction to address the claim for relief made by Claimant-Petitioner (Petitioner) and made no further recommendation regarding Petitioner's issues.

As grounds for this appeal, Claimant – Petitioner (Petitioner) asserts that OWC based its denial of jurisdiction on an AHD order that does not exist and without said order the Final Order is arbitrary and capricious and mandates an immediate and summary reversal by the CRB.

Employer-Carrier/Respondent (Respondent) has filed a response asserting that regardless of whether there is or not an actual July 27, 2005 Order issued by an ALJ after he conducted a 45 minute Status Conference on that date, without a court stenographer, does not detract from the fact that there is no OWC jurisdiction as there are issues still pending at both the AHD and the CRB levels that involve similar or related issues to those which were the subject of the May 10, 2006 Informal Conference.

ANALYSIS

In the review of an appeal from OWC, the Board must affirm the order under review unless it is determined to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *See* 6 Stein, Mitchell & Mezines, ADMINISTRATIVE LAW, §51.93 (2001). For the reasons set forth herein, the Board concludes herein, that the Claims Examiner's August 10, 2006 order is not in accordance with the law; is vacated; and the matter remanded to OWC.

A thorough review of the parties' briefs reveals that both parties concede that the July 27, 2005 Order which the Claims Examiner bases her denial of jurisdiction does not exist. The panel has further reviewed OWC's administrative file and can find no evidence that such an order was ever issued on July 27, 2005. The Panel further takes note of the letters written by Respondent and Petitioner on September 1, 2005 and September 16, 2005 respectively which discusses a status conference that occurred at the AHD level on July 27, 2005 and that as a result of said status conference a request for a mediation conference was made to OWC and that a conference was scheduled and thereafter cancelled by OWC in a letter dated September 29, 2005. The administrative file contains an Application for Informal Conference received at OWC on March 09, 2006 which listed various issues to be addressed, all of which the Panel agrees are related to

including responsibility for administrative appeals filed prior to October 1, 2004, the effective date of the D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

requests for reimbursements for expense and not related to the status of Petitioner's disability. The Informal Conference was scheduled and re-scheduled for May 10, 2006. As there is no record created as a result of an informal conference the Panel has no way of ascertaining what happened at the informal conference other than what the parties have related in their written arguments. As noted above, neither party contends that an order was produced dated July 27, 2005 at the informal conference and the Panel has no evidence that any of the issues listed in Petitioner's request for an informal conference are currently pending before AHD. Accordingly, the Panel agrees that the Final Order as it is written is not in accordance with the law as it purports to be based upon an order which is not contained within the Agency file from OWC; is therefore of unknown content; rendering impossible the task of determining whether such an order, if it exists, supports the action of the claims examiner. Accordingly, on this record, the panel agrees that there is no factual basis to support the legal conclusion of no jurisdiction reached by the claims examiner.²

² The Panel acknowledges that in fact there is presently an Application for Review of a Compensation Order issued by AHD on November 25, 2005 awaiting assignment to a review Panel by the clerk of the CRB. The Panel nor the Board has any knowledge or record of any other pending appeal with regard to the Petitioner. Review of the November 25, 2005 Compensation Order reveals that the ALJ specifically stated that:

...the only issues presented for resolution in connection with this Compensation Order at the formal hearing commenced on February 23, 2005 and concluded on April 15, 2005 are the nature and extent of Claimant's disability with Claimant asserting that she is now permanently and totally disabled, and whether the previously stipulated average weekly wage ought be amended.

The ALJ included the following footnote which the Panel finds relative to the matter at hand:

At the time of the convening of the February 23, 2005 proceedings, Employer sought to raise an issue relating to whether Claimant's disability is causally related to the previously determined work injury. The basis of this new defense was Employer's contention that Claimant had undergone numerous unnecessary and unreasonable medical procedures without Employer's consent or agreement, and that as a result of those procedures Claimant's physical condition has been made worse. Employer contended that if such were shown to be the case, then Employer would not be liable for the resulting disability. The undersigned declined to entertain said defense, in that Employer was not claiming that the particular medical procedures were obtained as a result of some unrelated, non-work related medical cause or conditions, but merely that the procedures were not reasonable or necessary. That defense and issues related thereto are currently the subjects of proceedings pending before OWC in connection with a utilization review being conducted pursuant to a previous order of AHD. Regardless of the outcome of those utilization review proceedings, however, Employer has cited no authority for the proposition that is not responsible for causally related disability resulting from the work injury or from the effects brought about as a result of medical care rendered as a result of that work injury, regardless of whether it is ultimately determined that said medical care was not medically necessary.

The ultimate conclusion by the ALJ in the November 29, 2005 Compensation Order which is presently on appeal is that "Claimant is permanently and totally disabled as a result of the work injury and its sequelae, and that the previously established average weekly wage is *res judicata*". The ALJ accordingly granted Petitioner's request to be deemed permanently and totally disabled and denied a re-determination of the average weekly wage.

The Panel concludes that the issues raised in the March 9, 2006 request for an Informal Conference are severable and distinct from the ALJ's conclusion stated herein, as they are related to requests for reimbursements for expense and not related to the status of Petitioner's disability. The CRB is accordingly not precluded from reviewing the

We have previously held that, where an action under review is premised upon the terms and contents of an order from a legal tribunal, and where the existence at law of said order is questioned on appeal to the CRB and cannot be resolved by resort to the Agency file transmitted in the process of the CRB appeal, a remand for the purpose of clarifying the status of the disputed order is necessary to avoid the decision under review being deemed arbitrary and capricious. *See Cindy McGee v. Custodian of the Special Fund, District of Columbia Department of Employment Services*, CRB (Dir. Dkt.) No. 03-052, (July 17, 2006). We are faced with the same issue here. In that we are unable to determine whether there is in fact such an order, and if so, whether that order supports the decision of the claims examiner, this matter must be remanded to OWD for clarification. If on remand, the referenced order is identified and located, the claims examiner must make it a part of the Agency file in connection with this matter; if no such order exists, the claims examiner must further consider the matters presented to OWC for resolution in light of the non-existence of the referenced order.

CONCLUSION

The Final Compensation Order of August 10, 2006 claiming that OWC does not have jurisdiction to address the issues raised by Petitioner in her request for an informal conference, without the existence of the July 27, 2005 order, is an abuse of discretion and not in accordance with the law.

ORDER

The Final Compensation Order of August 10, 2006 is hereby vacated and the matter remanded to OWC to consider the issues raised by Petitioner by holding another informal conference if necessary and issue a Memorandum of Informal Conference approving or denying Petitioner's request pursuant to 7 D.C.M.R. §219, or otherwise addressing the issues presented in accordance with the foregoing Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:

LINDA F. JORY
Administrative Appeals Judge

November 15, 2006
DATE

OWC order. *See Georgetown University Hospital v. Department of Employment Services*, 659 A.2d 832 (June 8, 1995).